

Nos. 17-1618, 17-1623, 18-107

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In the  
**Supreme Court of the United States**

GERALD LYNN BOSTOCK,  
*Petitioner,*

v.

CLAYTON COUNTY, GEORGIA,  
*Respondent.*

ALTIITUDE EXPRESS, INC. AND RAY MAYNARD,  
*Petitioners,*

v.

MELISSA ZARDA AND WILLIAM MOORE, JR., CO-  
INDEPENDENT EXECUTORS OF THE ESTATE OF DONALD  
ZARDA, ET AL.,  
*Respondents.*

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,  
*Petitioner,*

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND  
AIMEE STEPHENS,  
*Respondents.*

On Writs of Certiorari to the United States Courts of  
Appeals for the Eleventh, Second, and Sixth Circuits

**BRIEF OF THE SOUTHERN POVERTY LAW  
CENTER, CHILDREN'S DEFENSE FUND, DÉMOS,  
ECONOMIC POLICY INSTITUTE, NATIONAL  
ASSOCIATION OF SOCIAL WORKERS, NATIONAL  
CENTER FOR LAW AND ECONOMIC JUSTICE,  
POVERTY & RACE RESEARCH ACTION  
COUNCIL, AND 9TO5, NATIONAL ASSOCIATION  
OF WORKING WOMEN AS AMICI CURIAE IN  
SUPPORT OF THE EMPLOYEES**

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**INTEREST OF AMICI CURIAE<sup>1</sup>**

Amici curiae are civil rights, anti-poverty, and child and family welfare organizations dedicated to eradicating poverty, its associated harms, and its causes. One common cause of poverty is unequal access to employment due to discrimination. The questions presented in these cases speak directly to workplace discrimination. As organizations that fight discrimination and poverty, amici have a substantial interest in the resolution of those questions.

The Southern Poverty Law Center (“SPLC”) is a non-profit civil rights organization dedicated to fighting hate and bigotry and seeking justice for the most vulnerable members of society. Since its founding in 1971, SPLC has won numerous landmark legal victories on behalf of the exploited, the powerless, and the forgotten. As part of its work, SPLC has served as counsel for lesbian, bisexual, gay, or transgender (“LGBT”) persons asserting their constitutional or civil rights and has filed multiple briefs in this Court and the courts of appeals. In particular, SPLC appeared as counsel of record in *Frontiero v. Richardson*, 411 U.S. 677 (1973), a critical sex-discrimination case which paved the way

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<sup>1</sup> No counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than amici, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief. The employers have filed a blanket consent with the Court, and the employees have provided written consent.

for this Court's subsequent holding that intermediate scrutiny applies to gender-based classifications.

The Children's Defense Fund ("CDF") is a national non-profit child advocacy organization that has worked relentlessly for more than 40 years to ensure a level playing field for all children. CDF champions policies and programs that lift children out of poverty, protect them from abuse and neglect, and ensure their access to health care, quality education, and a moral and spiritual foundation. CDF advocates nationwide on behalf of children to ensure children are always a priority, paying particular attention to the needs of poor children, children of color, and those with disabilities.

Dēmos is a dynamic think-and-do tank that powers the movement for a just, inclusive, multiracial democracy. Founded in 2000, Dēmos brings litigation, conducts original research, and engages in advocacy and strategic communications to advance economic justice and remove barriers to political participation. The organization's anti-poverty work focuses on research and policy solutions to overcome racial and economic inequality. The organization is deeply involved in the Black Census Project, which explores economic issues faced by LGBT people of color, including low pay. Dēmos' race-forward state policy platform, *Everyone's America: State Policies for an Equal Say in Our Democracy and an Equal Chance in Our Economy*, requires, as a component, guaranteed fair employment for LGBT people, precisely because harassment and discriminatory hiring, firing, promotions, and pay continue to shape the U.S. labor markets in ways that systemically disadvantage people of color and LGBT workers, among others.

The Economic Policy Institute (“EPI”) is a non-profit organization with over 30 years of experience analyzing the effects of economic policy on the lives of American’s working families. EPI strives to protect and improve the economic conditions of working people. EPI is concerned that all employees enjoy the full protections of labor and employment laws. As part of its work, EPI has participated as *amicus curiae* in numerous cases involving workers’ rights and economic justice.

The National Association of Social Workers (“NASW”), established in 1955, is the largest association of professional social workers in the United States, with over 120,000 members in 55 chapters. As part of its mission to improve the quality and effectiveness of social work practice, NASW promulgates professional standards through the NASW Code of Ethics, provides continuing education, and develops policy statements on issues of importance to the social work profession. Consistent with those policy statements, NASW supports the adoption of local, state, federal, and international policies and legislation that ban all forms of discrimination based on sexual orientation.

The National Center for Law and Economic Justice has decades of experience litigating in state and federal courts nationwide to protect and promote the economic security of low-income families and individuals, and as part of that advocacy has worked to protect access to the courts for these individuals.

The Poverty & Race Research Action Council (“PRRAC”), a 20-year-old civil rights policy organization based in Washington, D.C., is committed to bringing the insights of social science research to the fields of civil rights and poverty law. PRRAC’s



work focuses on the government's role in creating and remedying patterns of structural racism, in particular the causes and consequences of racial and economic segregation. PRRAC seeks to understand and address the long term consequences of such policies for low-income families of color, especially across generations.

9to5, National Association of Working Women ("9to5") is a grassroots, member-led organization. With 45 years of experience in the field, 9to5 continues to advocate for equality at the intersections of gender, class, and racial and ethnic justice. 9to5 works on issues that are directly impacted by our membership. 9to5's members are working women, men and those who identify as gender-nonconforming—across gender, class, racial and ethnic divides. 9to5's work is to end discrimination in the workplace and beyond, and to win good jobs for the formerly incarcerated, higher wages and equal pay, work/family policies, child care and other work and income supports, and to advance the growing movement toward a more equitable society.

As national organizations with substantial expertise in eradicating discriminatory practices that drive poverty, as well as racial and gender inequality, and who see firsthand the devastating effects that poverty has on families and communities, amici have obtained critical insight into the real-world consequences of the legal issues pending before this Court. This brief shares that expertise and insight with the Court. In particular, this brief focuses on the harmful effects of employment discrimination against LGBT people—especially LGBT women, people of color, and those in small, rural communities—and its

impact on those individuals, their families, and the community at large.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

As this Court has explained, discrimination in employment based on sex is an “evil” which Title VII prohibits. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998). That discrimination can take many forms, and is actionable so long as an employee can show that the discrimination was “because of [an individual’s] sex.” *Id.* at 80. The employees in these cases have explained why LGBT discrimination is a form of discrimination “because of sex.” *Id.* Amici agree fully. What this brief will explain is how pervasive and far-reaching that “evil” in fact is.

LGBT people experience sex-based discrimination in the workplace at alarming rates. This discrimination ranges from being denied a job to enduring daily insults. And the discrimination is particularly pronounced for LGBT women and people of color. Such discrimination is a harm in and of itself.

But workplace discrimination against LGBT people leads to a cascade of other harms. Without legal protection from discrimination, an LGBT person could become unemployed, if not entirely unemployable, in many communities and sectors. Such unemployment, in turn, negatively affects access to healthcare and housing, as well as that person’s health. And LGBT people are not the only victims. Joblessness increases the need for government assistance programs and reduces overall economic output. And, perhaps most tragically, unemployment and unstable employment harm

children—millions of whom are being raised by LGBT people. These harms are not evenly distributed; LGBT women and people of color are disproportionately harmed.

Discrimination, moreover, takes its toll even when the LGBT person remains employed. Hostile and abusive workplaces are both commonplace and particularly harmful for LGBT people. The fear of having to endure such an environment, paired with the fear of adverse employment actions (that could lead to unemployment), often forces LGBT people to conceal their identities. That, in turn, has a significant impact on their mental health and productivity at work. The decision to conceal one's identity in order to get or keep a job also forces some LGBT people to face an unconscionable choice: should they forego a family or relationships in order to avoid detection? These harms are particularly acute in smaller communities, where work and community life are not easily segregated. For millions of LGBT people, lack of protection against sex-based discrimination may force them to live in a perpetual state of secrecy.

Discrimination against LGBT people pervades and harms the nation. This Court should reject a “categorical rule” (*Oncale*, 523 U.S. at 79) denying LGBT people the protections of Title VII.

## ARGUMENT

### I. LGBT PEOPLE, AND ESPECIALLY LGBT WOMEN AND PEOPLE OF COLOR, EXPERIENCE SEX-BASED DISCRIMINATION IN THE WORKPLACE.

Empirical evidence shows that LGBT people experience persistent and pernicious employment

discrimination across geographies, industries, and sectors of the nation's workforce. There are real people behind these figures. And LGBT women and people of color suffer from discrimination in the workplace to an even greater degree.

### **A. LGBT People Face Workplace Discrimination At Alarming Rates.**

Despite making up over 4% of the nation's population and around 6% of its workforce,<sup>2</sup> LGBT people continue to face workplace discrimination at alarming rates. According to the U.S. Commission on Civil Rights, up to 47% of LGBT workers have experienced discrimination because of their sexual orientation or transgender status.<sup>3</sup> This discrimination manifests itself in all aspects of employment, including the job application process, promotion, and unequal compensation.<sup>4</sup> In one study, nearly one in ten LGB employees reported losing a job due to their sexual orientation.<sup>5</sup> And as many as 37%

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<sup>2</sup> U.S. Comm'n on Civil Rights, *Working for Inclusion* 9–10 (2017) (“*Working for Inclusion*”), [https://www.usccr.gov/pubs/docs/LGBT\\_Employment\\_Discrimination2017.pdf](https://www.usccr.gov/pubs/docs/LGBT_Employment_Discrimination2017.pdf); The Williams Inst., *Adult LGBT Population in the United States* 1 (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Population-Estimates-March-2019.pdf>.

<sup>3</sup> *Working for Inclusion* 11 & n.52.

<sup>4</sup> NPR et al., *Discrimination in America: Experiences and Views of LGBTQ Americans* 1 (2017), <https://www.npr.org/documents/2017/nov/npr-discrimination-lgbtq-final.pdf>.

<sup>5</sup> Brad Sears & Christy Mallory, The Williams Inst., *Documented Evidence of Employment Discrimination & Its Effects on LGBT People* 1 (2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf>.

of gay and lesbian people—and a full 90% of transgender people—have been harassed at work.<sup>6</sup>

Real people with real stories exist behind these numbers. Consider the story of Officer Michael Carney from Springfield, Massachusetts.<sup>7</sup> At his police academy graduation party, a fellow graduate brought a male companion. Though the officer insisted that the man was only a friend, other officers suspected otherwise and, by the end of the evening, they assaulted him. After witnessing such hostility firsthand, Officer Carney decided to remain in the closet throughout his career as a police officer.<sup>8</sup> But the closet took its toll and, “after years of torment,” Officer Carney eventually resigned from Springfield’s police force.<sup>9</sup> Later, after he received professional help and came out as gay, Officer Carney attempted to return to the police force. But because he was now an openly gay man, and despite the police chief’s acknowledgement that he had done “a commendable job as a police officer,” his application was denied.<sup>10</sup>

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<sup>6</sup> Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 Loy. L.A. L. Rev. 715, 721 (2012); *Working for Inclusion* 11 & n.54.

<sup>7</sup> *Employment Non-Discrimination Act: Ensuring Opportunity for All Americans: Hearing on S. 1584 Before the S. Comm. on Health, Education, Labor, & Pensions*, 111th Cong. 36–40 (2009) (statement of Michael Carney), <https://www.govinfo.gov/content/pkg/CHRG-111shrg75804/html/CHRG-111shrg75804.htm> (unnumbered text).

<sup>8</sup> *Id.* at 36.

<sup>9</sup> *Id.* at 37.

<sup>10</sup> *Id.*

Laura Calvo is another real-world example of how even those who put their lives on the line face discrimination and unemployment as a result of LGBT discrimination—whether they chose to live openly or not. Calvo, a transgender woman, hid her gender identity in order to keep her job as a police officer with the Josephine County Sheriff’s Department.<sup>11</sup> Although she earned numerous commendations during her 16-year tenure, including being named deputy of the year, she was fired when personal items were burgled and her transgender identity was revealed.<sup>12</sup>

And then there is Yolanda Boone from Baltimore, Maryland.<sup>13</sup> Boone, who is a lesbian, worked as a forklift operator. After a few months on the job she agreed to take on the night shift for extra income. Almost immediately, the night-shift manager began a barrage of verbal harassment against her: “I want to turn you back into a woman”; “I want you to like men again”; or “[a]re you a girl or a man?”<sup>14</sup> Though she endured this harassment for weeks, she eventually complained to human resources—and she was fired the next time she showed up for work.<sup>15</sup>

No employee in any sector of the workforce—public or private, white- or blue-collar—is immune

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<sup>11</sup> *Id.* at 82 (prepared statement of Rea Carey, Executive Director, National Gay and Lesbian Task Force Action Fund).

<sup>12</sup> *Id.*

<sup>13</sup> *See generally* Complaint, *EEOC v. Pallet Cos.*, No. 1:16-cv-00595-RDB (D. Md. Mar. 1, 2016), ECF No. 1.

<sup>14</sup> *Id.* ¶ 15.

<sup>15</sup> *Id.* ¶¶ 17-23.

from LGBT discrimination. In 2014, Brett Bigham was Oregon's first openly gay teacher of the year; the following year, he was fired in retaliation for complaining of LGBT discrimination.<sup>16</sup> Crystal Moore worked in law enforcement for 23 years without a single reprimand and became the Chief of Police; she was fired by a new boss who openly held anti-LGBT beliefs.<sup>17</sup> Dianne Schroer, a 25-year veteran of the Army's Special Forces and recipient of the Defense Superior Service Medal, was offered a position as a terrorism research specialist at the Library of Congress; her job offer was withdrawn when her employer learned she was transgender.<sup>18</sup> As these stories show, LGBT discrimination affects people in all occupations and in workplaces throughout the nation.

### **B. Discrimination Is Even Worse For LGBT Women And People Of Color**

For LGBT women and people of color, workplace discrimination is even more prevalent. Lesbian, bisexual, and transgender women are 30% less likely to be hired than straight women with identical

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<sup>16</sup> Laura Frazier, *Multnomah Education Service District terminates 2014 teacher of the year*, *The Oregonian* (Apr. 3, 2015), [https://www.oregonlive.com/education/2015/04/multnomah\\_education\\_service\\_di\\_2.html](https://www.oregonlive.com/education/2015/04/multnomah_education_service_di_2.html).

<sup>17</sup> Amanda Sakuma, *South Carolina police chief fired for being gay? Yup, that can happen*, *MSNBC* (Apr. 24, 2014), <http://www.msnbc.com/msnbc/crystal-moore-south-carolina-29-states-can-fire-you-being-gay>.

<sup>18</sup> *Schroer v. Billington*, 577 F. Supp. 2d 293, 295-96, 299 (D.D.C. 2008).

credentials.<sup>19</sup> Similarly, one survey showed that LGBT people of color are at least twice as likely as white LGBT people to experience LGBT discrimination when applying for jobs.<sup>20</sup> They are also paid less than white LGBT workers.<sup>21</sup>

LGBT women and people of color are susceptible to discrimination on multiple grounds—what is known as “intersectional” discrimination. Intersectionality recognizes that when two bases for discrimination exist, they cannot be neatly reduced to distinct components. The combined effects of, for example, race and gender discrimination operate to marginalize individuals in ways different than that experienced by a single race or gender. *See, e.g., Lam v. Univ. of Hawai’i*, 40 F.3d 1551, 1562 (9th Cir. 1994) (explaining that “the attempt to bisect a person’s identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences”).

One reason this segment of the LGBT community might experience more discrimination than white, gay men is because—without legal protection—

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<sup>19</sup> Emma Mishel, *Discrimination against Queer Women in the U.S. Workforce: A Résumé Audit Study* 11, Socius: Sociological Research for a Dynamic World 1–13 (2016), <https://journals.sagepub.com/doi/pdf/10.1177/2378023115621316>.

<sup>20</sup> NPR et al., *supra* note 4, at 1; *see also* Alexander M. Nourafshan, *The New Employment Discrimination: Intra-LGBT Intersectional Invisibility and the Marginalization of Minority Subclasses in Antidiscrimination Law*, 24 Duke J. Gender L. & Pol’y 107, 120–21 (2017) (noting that intersectional discrimination is “particularly consequential” for racial minorities because they identify as LGBT at the highest rates).

<sup>21</sup> Nourafshan, *supra* note 20, at 123.



employers can use anti-LGBT bias as a *pretext* to discriminate against these individuals based on a protected characteristic. Consider the facts of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989): Anne Hopkins’s employer violated Title VII when it denied her a promotion on the ground that she did not conform to sex stereotypes by being too “aggressive” (a protected sex-based characteristic). *See* 490 U.S. at 250. But an adverse decision here would allow the same employer to deny Ms. Hopkins a promotion on the ground that she was “dykish” (an unprotected LGBT trait). As the above research shows, that untenable result would be a very real consequence of a decision limiting the reach of Title VII and would expose women and people of color to even more harassment and discrimination under the guise of “acceptable” anti-LGBT animus.

## **II. THIS SEX-BASED DISCRIMINATION CREATES AND COMPOUNDS SIGNIFICANT INDIVIDUAL AND SOCIETAL HARMS.**

Although the discrimination described above is an “evil” in and of itself, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998), the cascading harms of employment discrimination extend further still. Without Title VII’s protections, LGBT workers would face unemployment. Unemployment, in turn, leads to lower incomes, less access to healthcare, and poorer health, as well as harms to society and to children. LGBT workers would also face hostile work environments. The fear of having to endure such an abusive environment, paired with the fear of other adverse employment consequences, would cause some LGBT workers to remain in the closet. And that, in turn, would cause psychological harm to the LGBT person, as well as harm to their families and

relationships. In short, a “categorical rule” excluding LGBT people from Title VII’s protections would have far greater impacts on LGBT people, their families, and their communities than simply denying plaintiffs damages in a few cases.

**A. Without Title VII’s Protections, LGBT People Would Face Unemployment And Associated Harms.**

**1. Unemployment Harms LGBT People.**

As the U.S. Commission on Civil Rights has explained, “[w]orkplace discrimination against LGBT communities can cause job instability and high turnover, resulting in greater unemployment and poverty rates.”<sup>22</sup>

Unemployment then triggers a variety of harms, especially when it is the result of bias. As perhaps the most obvious consequence, unemployment and persistent joblessness can lead to poverty or a lower income.<sup>23</sup> “[T]he monthly poverty rate for households with a long-term unemployed member (someone unemployed for six months or more) is much higher than the rate for households with no long-term unemployment.”<sup>24</sup> This also creates a vicious cycle:

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<sup>22</sup> *Working for Inclusion* 14.

<sup>23</sup> Lawrence Mishel & Heidi Shierholz, Econ. Pol’y Inst., *Sustained, High Joblessness Causes Lasting Damage to Wages, Benefits, Income, and Wealth* 19 (2011), [https://www.epi.org/files/temp2011/BriefingPaper324\\_FINAL%20%283%29.pdf](https://www.epi.org/files/temp2011/BriefingPaper324_FINAL%20%283%29.pdf); *Working for Inclusion* 15.

<sup>24</sup> Austin Nichols & Zachary J. McDade, *Long-Term unemployment and poverty produce a vicious cycle*, Urban Inst.: Urban Wire: Income and Wealth (Sept. 17, 2013), <https://www.urban.org/urban-wire/long-term-unemployment-and-poverty-produce-vicious-cycle>.

once an individual experiences long-term unemployment, their ability to find work diminishes substantially.<sup>25</sup>

Unemployment can also affect LGBT people's access to healthcare, either because the person loses employer-sponsored health insurance or loses an income to pay for medical expenses. In a survey conducted by the Census Bureau, 22% of uninsured nonelderly adults reported that they lacked health insurance because the person who carried the health coverage in their family lost their job or changed employers.<sup>26</sup> As for healthcare costs, the average American already struggles to pay his or her family's medical expenses—so without a job, that difficulty can become an impossibility.<sup>27</sup> And poorer individuals are “more than four times more likely to delay or forgo needed medical care due to cost than those with middle or high incomes.”<sup>28</sup>

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<sup>25</sup> Serene Lei, Urban Inst., *27 Weeks and Counting: Long-Term Unemployment in America* 7 (2013), <http://apps.urban.org/features/longtermunemployment/27weeks.pdf>.

<sup>26</sup> Henry J. Kaiser Family Found., *Key Facts about the Uninsured Population* 4 (2018), <http://files.kff.org/attachment/fact-sheet-key-facts-about-the-uninsured-population>.

<sup>27</sup> *Id.* at 3 (“In 2017, 45% of uninsured nonelderly adults said they were uninsured because the cost is too high . . .”); Helaine Olen, *Even the Insured Often Can't Afford Their Medical Bills*, *The Atlantic* (June 18, 2017), <https://www.theatlantic.com/business/archive/2017/06/medical-bills/530679/> (collecting and discussing studies regarding Americans' ability to afford medical bills).

<sup>28</sup> Univ. of Wisc.-Madison Inst. for Research on Poverty, *Reducing Health Disparities by Poverty Status* 1 (2015), <https://www.irp.wisc.edu/wp/wp-content/uploads/2018/05/PB4-ProvenPoliciesToReduceHealthDisparities.pdf>.

Unemployment also affects a person's health. Psychological research has long shown that job loss negatively affects a person's mental health.<sup>29</sup> Job loss also has been linked to negative effects on physical health.<sup>30</sup> The effects are so serious that there is a strong, positive association between unemployment and increased rates of overall mortality, mortality from cardiovascular disease, lung cancer, and suicide.<sup>31</sup>

## 2. LGBT Unemployment Harms Society.

Unemployment does not just affect LGBT people; it increases the need for government assistance programs and reduces overall economic output.

Unemployed people or people at lower incomes are more likely to receive assistance from government programs like the Supplemental Nutrition Assistance Program (SNAP), Medicaid, unemployment benefits, and public housing assistance.<sup>32</sup> This is especially

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<sup>29</sup> Jennie E. Brand, *The Far-Reaching Impact of Job Loss and Unemployment*, 41 *Annual Review of Sociology* 359, 365-67 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4553243/pdf/nihms684362.pdf> (unnumbered text).

<sup>30</sup> Brand, *supra* note 29, at 367-68; Larisa Antonisse & Rachel Garfield, Henry J. Kaiser Family Found., *The Relationship Between Work and Health: Findings from a Literature Review* 1 (2018), <https://www.kff.org/medicaid/issue-brief/the-relationship-between-work-and-health-findings-from-a-literature-review/>.

<sup>31</sup> Gordon Waddell & A. Kim Burton, *Is Work Good for Your Health and Well-Being?* 11 (2006), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/214326/hwwb-is-work-good-for-you.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/214326/hwwb-is-work-good-for-you.pdf).

<sup>32</sup> Caitlin Rooney et al., Ctr. for Am. Progress, *Protecting Basic Living Standards for LGBTQ People* 1-2 (2018),

true for LGBT people; for example, in one survey, 22.7% of LGBTQ respondents reported receiving support from SNAP compared to 9.7% of non-LGBTQ respondents.<sup>33</sup> Relatedly, unemployment often leads to loss of housing.<sup>34</sup> In one survey of agencies that provide housing to the homeless, 30% of clients in housing programs identified as LGBT and, on average, 60% of these agencies' funding came from government.<sup>35</sup>

Unemployment due to discrimination burdens the national economy. "Replacing employees due to discrimination can cost anywhere from \$5,000 to \$10,000 for an hourly worker, and between \$75,000 to \$211,000 for an executive who makes \$100,000 a year."<sup>36</sup> One study estimated that, in Georgia alone, an employer loses an average of \$9,100 every time an employee leaves a job because of LGBT

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<https://cdn.americanprogress.org/content/uploads/2018/08/10095627/LGBT-BenefitCuts-report.pdf>.

<sup>33</sup> *Id.* at 4.

<sup>34</sup> Nat'l Law Ctr. on Homelessness & Child Poverty, *Homelessness in America: Overview of Data and Causes* 3 (2015), [https://nlchp.org/wp-content/uploads/2018/10/Homeless\\_Stats\\_Fact\\_Sheet.pdf](https://nlchp.org/wp-content/uploads/2018/10/Homeless_Stats_Fact_Sheet.pdf) (citing unemployment as a leading cause of homelessness).

<sup>35</sup> Laura E. Durso & Gary J. Gates, The Williams Inst., *Serving Our Youth: Findings from a National Survey of Service Providers Working with Lesbian, Gay, Bisexual, and Transgender Youth Who Are Homeless or At Risk of Becoming Homeless* 3, 6 (2012), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July-2012.pdf>.

<sup>36</sup> *Working for Inclusion* 15.

discrimination.<sup>37</sup> In other words, discrimination against LGBT employees causes a \$47 million loss in annual profits due to training expenditures for replacement employees and unemployment benefits.<sup>38</sup> Thus, unemployment due to LGBT discrimination is not just harmful on a microeconomic level but also on a macroeconomic level.

### **3. LGBT Unemployment Harms Children In Particular.**

When a person is unable to work, she not only loses her own livelihood, but any family members she supports also lose a source of income.

Unemployment, including LGBT unemployment, thus deprives families of support—exposing millions of children to significant, long-term harm. LGBT people are raising millions of children.<sup>39</sup> Those children (like all children) need their parents to be able to support their families. *Cf. Obergefell v. Hodges*, 135 S. Ct. 2584, 2600–01 (2015) (discussing how discrimination against LGBT people in the form of depriving same-sex couples of the right to marry causes children of those couples to “suffer . . . significant material costs” in comparison to different-sex couples).

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<sup>37</sup> Christy Mallory et al., The Williams Inst., *The Economic Impact of Stigma and Discrimination Against LGBT People in Georgia* 37–38 (2017), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Economic-Impact-of-Discrimination-and-Stigma-against-LGBT-People-in-Georgia-FINAL-4.pdf>.

<sup>38</sup> *Working for Inclusion* 15.

<sup>39</sup> Gary J. Gates, The Williams Inst., *LGBT Parenting in the United States* 1 (2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf>.

LGBT people already struggle to provide for their families. They are more likely to report a lower family income and an income near the poverty level. For example, in 2013, nearly one in five children being raised by same-sex couples (24%) lived in poverty compared to 11% of children raised by married different-sex couples.<sup>40</sup> Excluding LGBT people from protections for sex-based discrimination in employment would only exacerbate poverty rates for these children.

Finally, the effects of unemployment on children are more than just the loss of a family income. As pediatricians have documented, “[c]hildren who experience poverty, particularly during early life or for an extended period, are at risk of a host of adverse health and developmental outcomes through their life course.”<sup>41</sup> Additionally, “[k]ids whose parents are unemployed for a long time tend to perform worse in school than their peers with employed parents,” likely due to family stress, lack of health insurance, and reduced income that all follow from a parent’s joblessness.<sup>42</sup> And, just as unemployment sets an adult on a vicious cycle of future unemployment, family poverty that may result from a parent’s

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<sup>40</sup> Gary J. Gates, The Williams Inst., *Demographics of Married and Unmarried Same-Sex Couples: Analyses of the 2013 American Community Survey* 7 (2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Demographics-Same-Sex-Couples-ACS2013-March-2015.pdf>.

<sup>41</sup> Am. Acad. of Pediatrics Council on Community Pediatrics, *Poverty and Child Health in the United States* 1, 137 Pediatrics (2016), <https://pediatrics.aappublications.org/content/pediatrics/137/4/e20160339.full.pdf>.

<sup>42</sup> Lei, *supra* note 26, at 8.

unemployment renders a child more likely to be unemployed.<sup>43</sup> Thus, as in so many other ways discussed above, the effects of unemployment are felt beyond the simple loss of a job—and children in particular feel those effects.

**B. Without Title VII’s Protections, LGBT People Would Face A Hostile Workplace And Associated Harms.**

For LGBT people who are able to surmount these obstacles and secure and maintain employment, the ordeal is far from over. At work, LGBT people are often confronted with the very sort of hostile environment that Title VII prohibits. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (recognizing that the creation of a “work environment abusive to employees” on the basis of their sex “offends Title VII’s broad rule of workplace equality”). And, as research shows, this form of discrimination inflicts significant psychological and physiological harms.<sup>44</sup>

To avoid such abusive environments, and other adverse employment consequences (such as termination), many LGBT people choose to hide their identities at work.<sup>45</sup> But concealing one’s identity in this way works its own species of harm.

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<sup>43</sup> Children’s Def. Fund, *Ending Child Poverty Now* 14 (2019), <https://www.childrensdefense.org/wp-content/uploads/2019/04/Ending-Child-Poverty-2019.pdf>.

<sup>44</sup> Br. of Amici Curiae Ilan H. Meyer, Ph.D in Supp. of Resp’ts 14, 20–26, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 5036301 (“[E]xposure to minority stress has a negative impact on the health and well-being of LGB people.”).

<sup>45</sup> Human Rights Campaign, *A Workplace Divided: Understanding the Climate for LGBTQ Workers Nationwide* 10



Studies show that being closeted at work decreases productivity,<sup>46</sup> which can lead to poorer job performance, lack of promotion, and lower pay. It also can lead to stress and exhaustion; one-fifth of LGBT workers have reported feeling exhausted from having to conceal their identities at work.<sup>47</sup> Another study found that openly LGB employees “had fewer signs of anxiety, depression, and burnout” than those who remained in the closet.<sup>48</sup>

LGBT people may also forego marriage and romantic relationships to avoid “outing” themselves at work. Particularly in small, close-knit communities, it is often impossible for LGBT people to be out with friends and family but closeted at work.

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(2018), [https://assets2.hrc.org/files/assets/resources/AWorkplaceDivided-2018.pdf?\\_ga=2.13533047.1936550817.1559825772-618228148.1559825772](https://assets2.hrc.org/files/assets/resources/AWorkplaceDivided-2018.pdf?_ga=2.13533047.1936550817.1559825772-618228148.1559825772) (estimating that 46% of LGBT employees are closeted at work).

<sup>46</sup> Human Rights Campaign, *The Cost of the Closet and the Rewards of Inclusion* 2–3, 22 (2014), [http://assets2.hrc.org/files/assets/resources/Cost\\_of\\_the\\_Closet\\_May2014.pdf](http://assets2.hrc.org/files/assets/resources/Cost_of_the_Closet_May2014.pdf); see also Crosby Burns, Ctr. for Am. Progress, *The Costly Business of Discrimination* 33 (2012), [https://www.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/lgbt\\_biz\\_discrimination.pdf](https://www.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/lgbt_biz_discrimination.pdf) (“Gay and transgender employees who are out at work are 20 to 30% more productive than their closeted counterparts.”).

<sup>47</sup> Human Rights Campaign, *supra* note 46, at 3, 22; see also Pizer et al., *supra* note 6, at 736 (remaining closeted leads to negative attitudes about work, increased physical symptoms of work-related stress, and feelings of isolation and mistrust).

<sup>48</sup> Lindsay Abrams, *Study: People Who Come Out of the Closet Are Happier and Healthier*, *The Atlantic: Health* (Feb. 1, 2013), <https://www.theatlantic.com/health/archive/2013/02/study-people-who-come-out-of-the-closet-are-happier-and-healthier/272740>.

As amici know from their decades of experience working with LGBT people in these communities, fear of employment discrimination often leads LGBT people to remain in the closet in all aspects of their lives. So, as a practical matter, denying LGBT people Title VII protections would force many of them to make an impossible choice: a job or a family.

The inability to be “out” at work, and in one’s community, also makes it difficult for LGBT people to participate in the very political processes by which they might ultimately beat back the tide of discrimination and prejudice against them.<sup>49</sup> It is difficult to imagine that the many advances won by the LGBT community over the past few decades

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<sup>49</sup> Extensive research shows a robust correlation between social contact with lesbian and gay people and more accepting attitudes toward sexual orientation. See, e.g., Bob Altemeyer, *Changes in Attitudes Toward Homosexuals*, 42 *J. Homosexuality* 63 (2002); Norman Anderssen, *Does Contact with Lesbians and Gays Lead to Friendlier Attitudes? A Two Year Longitudinal Study*, 12 *J. Community & Applied Soc. Psychol.* 124 (2002); Rodney L. Bassett et al., *Being a Good Neighbor: Can Students Come to Value Homosexual Persons?*, 33 *J. Psychol. & Theology* 17 (2005); Andrew Garner, *Ambivalence, the Intergroup Contact Hypothesis, and Attitudes about Gay Rights*, 41 *Pol. & Pol’y* 241 (2013); see also Daniel DellaPosta, *Gay Acquaintanceship and Attitudes toward Homosexuality: A Conservative Test*, 4 *Socius: Sociological Research for a Dynamic World* 1 (2018) (providing results of a conservative test of the contact hypothesis for gay acceptance showing that people who had at least one gay or lesbian acquaintance at baseline exhibited larger attitude changes at two- and four-year follow-ups with regard to support for same-sex marriage and moral acceptance of homosexuality and showing that this contact effect extended even—and perhaps especially—to people who otherwise displayed more negative prior attitudes and lower propensities for gay and lesbian acquaintanceship).

would have been possible if LGBT individuals throughout the nation had stayed in the shadows. And yet that is precisely the position to which today's LGBT community would be relegated under an erroneous reading of Title VII.

**CONCLUSION**

For all of the foregoing reasons, and those set forth by the employees, this Court should affirm the judgments of the Second and Sixth Circuits, and reverse the judgment of the Eleventh Circuit.

Respectfully submitted,

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